REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 62 OF 2019

1. MONYORO MONG'ARE SHEM.....1ST APPELLANT

2. NICHOLAS MONG'ARE.....2ND APPELLANT

=VRS=

TIMOTHY NYAGAKA NYAGAKA.....RESPONDENT

{Being an appeal against the Judgement of Hon. B. M. Kimtai (Mr.) – PM Keroka dated and delivered on the 17th day of December 2019 in the original Keroka Principal Magistrate's Court Civil Case No. 103 of 2018}

JUDGEMENT

On 1st August 2018 the appellants' motor vehicle Registration No. KAR 388X collided with the respondent's motor cycle Registration No. KMDK 005C along the Nyansiongo – Kijauri Road as a result of which the respondent sustained several soft tissue injuries and an amputation of his right leg above the knee. Liability was determined in a test suit Keroka PMCC No. 104 of 2018 where the appellant was found wholly liable for the accident and the trial court was left to assess the quantum of damages which it awarded as follows: -

> **"(a) General damages – Kshs. 4,000,000/=**
>
> **(b) Loss of earnings – Kshs. 5,400,000/=**
>
> **(c) Future medical expenses – Kshs. 1,050,000/=**
>
> **(e) Special damages – Kshs. 169,875/="**

However, the trial Magistrate noting that his pecuniary jurisdiction was Kshs. 10,000,000/= entered judgement for the respondent to the extent of that pecuniary jurisdiction. This in effect means that the total award to the respondent is Kshs. 10,000,000/= only. This appeal is against the quantum of damages. The grounds of appeal are that: -

> **"1. The learned trial Magistrate grossly misdirected himself in treating the evidence and the submissions on quantum before him and consequently coming to a wrong conclusion on the same.**
>
> **2. The learned trial Magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of the law applicable.**
>
> **3. The learned trial Magistrate decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.**
>
> **4. The learned trial Magistrate erred in law and fact in relying on extraneous circumstances which were not supported by the evidence on record, hence arriving at a wrong finding as regards the nature of the plaintiff's injuries.**
>
> **5. The learned trial Magistrate erred in fact and in law by basing his judgement on the testimony of the plaintiff only having ruled to close of the defence case without witnesses.**
>
> **6. The learned trial Magistrate erred in fact and in law by awarding the plaintiff inordinately high quantum as damages in the circumstance of this case.**

7. The learned trial Magistrate erred in assessing an award, hereunder, which was inordinately high and wholly erroneous estimate of the loss and damages suffered by plaintiff;

Net Award Kshs. 10,000,000/= all inclusive.

8. The learned trial Magistrate erred in awarding an excessive sum for the injuries suffered in the face of the evidence adduced which was not sufficient to warrant the amount.

9. The learned trial Magistrate erred in fact and in law in awarding damages to a Claimant/Plaintiff for injuries not pleaded by the Respondents herein.

10. That the learned trial Magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustain in law."

It is proposed that this court sets aside the decree and judgement of the trial court and dismiss the suit with costs or re-assess the general damages and that the costs of this appeal be awarded to the appellants.

The appeal was canvassed by way of written submissions which I have considered fully alongside the evidence before the trial court as I am entitled to do as a first appellate court ***(See Selle & another v Associated Motor Boat Company Limited & others [1968] EA 123***).

In considering this appeal, I am guided by the principle that the assessment of damages is discretionary and an appellate ought not to interfere with the trial court's exercise of discretion unless it took into account an irrelevant factor or left out of account a relevant factor or the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage ***(See Kemfro Africa Ltd v AM Lubia & another (1982 – 88) 1KAR).*** I am also guided by the principle that the award of damages must be reasonable and that while no case is exactly like the other comparable injuries must attract comparable awards ***(see the case of Tayab v Kinau [1983] KLR 114 at p. 116).***

Counsel for the appellants submitted that the award of Kshs. 4,000,000/= as general damages for pain, suffering and loss of amenities was inordinately high and proposed that the same be substituted with an award of Kshs. 1,500,000/=. Counsel relied on the cases of **Joyce Moraa Oyaro v Hussein Dairy Ltd [2016] eKLR** and the case of **Nelson Njihia Kimani v David Marwa & another [2017] eKLR** where the courts awarded Kshs. 1,300,000/= and Kshs. 1,500,000/= respectively for injuries that included amputation of the leg. Counsel for the respondent however urged this court not to disturb the award and cited the cases of **Catherine Njeri Njoroge v Benard N. Njeru [2016] eKLR** and **Macharia Francis Mundui & another v Joel Wanje [2017] eKLR** where the courts awarded Kshs. 3,000,000/= for injuries similar to those of the respondent. Counsel submitted that the trial Magistrate took into account the passage of time in awarding the respondent Kshs. 4,000,000/=.

I have considered the rival submissions carefully. I have noted that in the case of **Kurawa Industries Limited v Dama Kiti & another [2017] eKLR** the respondent too had sustained amputation of one leg above the knee. The court observed that the award of Kshs. 2 million on 26th June 2015 was not excessive and upheld it noting that a sum of Kshs. 2.5 million was awarded to another plaintiff in March 2014. The cases of **Catherine Njeri Njoroge v Benard N. Njeru (supra)** and **Macharia Francis Mundui & another v Joel Wanje (supra)** where Kshs. 3,000,000/= was awarded for injuries similar to the respondent herein are more recent. The court must therefore take the passage of time (inflation) into account. However, I am persuaded that the award of Kshs. 4,000,000/= is inordinately high even taking inflation into account and accordingly the award is set aside and substituted with one for Kshs. 3,500,000/= (three million two hundred and fifty thousand shillings only).

On the award for loss of earnings, Counsel for the appellants faulted the trial Magistrate for adopting on earnings of Kshs. 1,200/= per day hence Kshs. 18000/= a month whereas the appellants' evidence was that he earned Kshs. 500/= per day. Counsel also faulted the trial Magistrate for adopting a multiplier of 25 years and contended that the award of Kshs. 5,400,000/= was inordinately high. Counsel for the respondent however submitted that the trial Magistrate did not err because he considered the injuries sustained by the respondent and his diminution of chances of getting an alternative job in the labour market and the fact that the doctor's evidence was that the respondent suffered 70% incapacity. Relying on the case of **Violet Jeptum Rahedi v Albert Kubai v Mbogori [2013] eKLR** Counsel submitted that the multiplier adopted was not erroneous as the respondent was in a private business not limited by any formal retirement age and that the earnings of Kshs. 1,200/= is what the respondent earned per day. I have carefully considered the rival submissions in regard to the damages under this head and whereas I appreciate that the respondent was entitled to an award for loss of earning capacity I agree with Counsel for the appellants that the award is not only inordinately high but that in arriving at the damages the trial court misdirected itself in law and principle. Firstly, although the respondent's averment in the plaint was that he was earning Kshs. 1,200/= per day his evidence was that he was earning Kshs. 500/= and hence the award based on Kshs. 1,200/= was erroneous. Secondly, the trial court's calculation of the damages based on a multiplier was not based on any principle. In the case of **Mumias Sugar Company Ltd v Francis Wanalo [2007] eKLR** the court observed: -

"……Loss of earning capacity can be claimed and awarded as part of general damages or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, a judge has to apply the correct principles and take relevant factors into account in order to ascertain the real or proximate financial loss that the plaintiff has suffered as a result of the disability."

In the case of **Fairly v John Thompson Ltd [1973] Llyods's Rep 40 at 41** the court drew distinction between loss of earnings and loss of earning capacity and held: -

"It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings are awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

In other words, loss of earnings must be specifically pleaded and proved as actual loss of future earnings are capable of being assessed prior to or at the time of filing the suit. ***{See also the case of Moeliker v Reyrolle & Co. Ltd [1977] 1 W LR 132*** cited with approval in the case of ***Mumias Sugar Company Ltd v Francis Wanialo (supra)}.*** On the other hand, loss of future earning capacity may be awarded as part of the general damages or as a separate head of damages. Counsel for the appellants proposed an award of Kshs. 300,000/= under this head. That in my view is rather on the lower side taking into account that in the case of **Mumias Sugar Co. Ltd v Francis Wanialo (Supra)** which was decided way back in 2007 the Court of Appeal awarded Kshs. 500,000/=. Doing the best I can I would award the respondent a sum of Kshs. 800,000/= (eight hundred thousand shillings only) under this head and set aside the award of Kshs. 5,400,000/=.

For future medical expenses I would award the respondent a sum of Kshs. 900,000/= as was awarded in the case of **Macharia Francis Mundui & another v Joel Wanje (supra)** as the circumstances of that case are similar. The award of Kshs. 1,050,000/= is accordingly set aside.

The trial Magistrate awarded specials of Kshs. 169,875/= which was less than what was pleaded in the plaint. It is apparent from the record that the respondent produced receipts to prove the special damages. The same were however not included in the record of appeal and for that reason I decline to interfere with the award.

In the upshot the appeal succeeds to the extent that the awards of general damages, loss of earning capacity and future medical expense are set aside and judgement for the respondent shall now be as follows: -

(a) General damages for pain, suffering and loss of amenities – Kshs 3,500,000/=.

(b) Loss of earning capacity – Kshs. 800,000/=.

(c) Future medical expenses – Kshs. 900,000/=

(d) Special damages – Kshs. 169,875/=

(e) Costs of the suit in the trial court.

(f) Interest at court rates (on general damages from date of the judgement in the lower court and on the special damages from the date of filing suit.

As the appellants have succeeded in substantially setting aside the awards in the lower court they shall get the costs of this appeal. It is so ordered.

SIGNED, DATED AND DELIVERED ELECTRONICALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 20TH DAY OF MAY 2021.

E. N. MAINA

JUDGE